

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of Part 95 of the Commission's)
Rules to Provide Regulatory Flexibility in)
the 218-219 MHz Service)

WT Docket No. 98-169
RM-8951

To: The Commission

**COMMENTS OF THE BAY AREA
218-219 MHZ GROUP**

The Bay Area 218-219 MHz Group ("Bay Area") hereby submits its Comments on the Commission's proposed rules for the newly named 218-219 MHz service.¹ Bay Area commends the Commission for its proposals and urges it to continue to eliminate the remaining regulatory restrictions which are inhibiting the development of this service. Accordingly, all restrictions on the assignment of licenses should be removed, including prohibitions on the ownership of both the A and B frequency blocks in a single market and prohibitions on the assignment of licenses obtained by random selection. While the proposed amnesty provisions for licensees unable to fulfill their obligations are constructive, they would continue the difficulties that have plagued the 218-219 MHz service. The Commission should fashion rules that encourage licensees that cannot make their auction

¹ The Bay Area 218-219 MHz Group is an informal association of persons and business entities who hold licenses in that service for the San Francisco, CA MSA, the San Jose, CA MSA, the Santa Rosa, CA MSA, and the Vallejo, CA MSA.

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payments to exit the industry quickly, without engaging their licenses in interminable and unproductive litigation, including bankruptcy proceedings. Finally, the Commission should remove all technical restrictions on the operations of the 218-219 MHz service, except for the obligation not to interfere with other licensees operating on the same and neighboring frequencies (including television channel 13.)

1. 218-219 MHz Licensee Should Respond To Market Forces Rather Than Regulations.

For almost 20 years the Commission has been advocating reliance on market forces rather than regulations to direct the activities of its licensees. Unfortunately, entrenched interests in various segments of the communications industry have often made it difficult for the Commission to implement its deregulatory doctrines. The Commission should regard the 218-219 MHz service as a unique opportunity to demonstrate the extent to which market forces can replace regulation in the communications industry. The small spectrum allocation of the 218-219 MHz service, its short history, and the failure of the application for which the service was originally designed, make the potential rewards of such an approach very great and the potential risks extremely small. Bay Area believes that if licensees are free to respond to market forces without restrictions on assignment and consolidation of licenses and without technical specifications regarding their operations the 218-219 MHz service will quickly bring a wide variety of new services to the American public.

2. The Commission Should Remove All Restrictions On Assignment And Consolidation of 218-219 MHz Licenses.

One of the most important elements of a free market is the ability to efficiently allocate needed resources – a process which takes place by unrestricted purchase and sale of those resources. The most persuasive rationale for preferring auctions of FCC licenses to lotteries was the efficiency of the former process in putting licenses into the hands of those who value them most.² That rationale neither ends with the auction, or applies only to licenses awarded by auction. The Commission has a continuing interest in ensuring that all of its licenses are held by those who value them most highly and can use them most efficiently.

If the 218-219 MHz service is to function properly it is essential that those who have the ability to use those licenses efficiently be able to obtain them. This truth applies *all* 218-219 MHz licenses, not just to those awarded by auction.

Indeed, it is difficult to imagine a regulation more harmful or unnecessary than the current restrictions on the assignment for the licenses in the 218-219 MHz service that were awarded by lottery. Given the state of the 218-219 MHz service, it is extremely unlikely that the lottery licensees will be "unjustly enriched" by the

² Bay Area recognizes the value of ensuring that the government receives appropriate value for use of a public asset. However, other methods would accomplish that purpose more effectively without discouraging participation by small businesses as auctions do. The best approach would be one which gave the government a continuing interest in the revenues generated with the spectrum, since that would ensure that the public received the actual long-term value of the spectrum rather than the perceived value at an instant in time. the spectrum (such as an ownership interest or an annual tax)

sale of their licenses. The Commission should be more concerned with the efficient use of licenses in 9 of the 10 largest markets in the nation than with the profit that a licensee might receive from a sale years after it obtained the license. In any event, any profit made by the lottery winners could hardly encourage others to flood the Commission with speculative applications in future lotteries, because there will not be any more lotteries.

The Commission should also remove existing restrictions on the ownership of both the A and B frequency block in the same market.³ While 0.5 megahertz may have been an adequate frequency allocation for the interactive video and data services that the Commission initially expected licensees to provide, there may be services that are feasible only with a larger allocation. It would not serve the public interest to prevent such services from being developed, particularly since it is highly unlikely that such consolidation would inhibit competition.⁴

3. The Commission Should Facilitate The Exit Of Licensees That Cannot Make Payments.

One of the most important actions that the Commission can take in the instant rulemaking is the implementation of a policy that will not only allow

³ Bay Area supports the Commission's proposal to allow licensees to reconfigure licensing areas.

⁴ It is hard to imagine any significant service being dominated by a single megahertz of spectrum. And in the unlikely event that there was some issue as to the market power of 218-219 MHz operators who held both frequency blocks, the Commission could quickly remedy that situation by allocating additional licenses or giving licensees in other services the ability to offer whatever unique service was the source of the market power.

licensees that lack the funds or the desire to develop their licenses to exit the service, but will encourage them to do so. To fulfill its responsibilities to the public, the Commission must focus on ensuring that financially qualified parties hold licenses in the 218-219 MHz, rather than punishing parties that erred in purchasing these licenses.

Bay Area believes that the best way to accomplish this objective is to offer complete amnesty to all licensees that made the initial 20% down-payments for their licenses.⁵ All such licensees would have the option to pay for any of their licenses in the manner proposed by the Commission in the Notice of Proposed Rulemaking (the "NPR") or to return any of their licenses to the Commission for a full refund of all payments made to the Commission.

Although the Commission's proposal to include provisions in an amnesty program that will deter licensees from returning licenses in order to purchase them more cheaply in a subsequent auction is superficially appealing, such provisions would ultimately be counterproductive. There has been far too much controversy already regarding the initial auction for licenses in the 218-219 MHz service. To

⁵ Problems pervaded the procedures for grace period requests, including misinformation provided by the non-FCC personnel (i.e., contractors) who processed the applications. These individuals often appeared ignorant the Commission's regulations and may have provided licensees with incorrect information about the need for filing grace period requests and/or the content of such requests. Under the circumstances, limiting the amnesty program to licensees that filed appropriate grace period requests is probably unfair and will undoubtedly result in litigation that may put a cloud on the 218-219 MHz licenses held by those parties for years to come.

the extent that some licensees believe that they overpaid for licenses because the Commission's rules allowed unqualified bidders to bid up the prices,⁶ or because the information which the Commission relied upon in creating interactive video and data services ("IVDS") was inaccurate and misled them, it is in the public interest to allow them to return their licenses. To the extent that the same parties believe that they can create a valuable business with the same licenses if their debt burden were smaller, it is in the public interest to allow them to bid with everyone else.

4. The Only Technical Restriction On 218-219 Operations Should Be The Obligation Not To Interfere

The Commission's new rules for the 218-219 MHz service must eliminate the unnecessary technical specifications that have stifled the growth and development of the service since its inception. The future of the 218-219 MHz service is most likely in mobile applications where the incentive is to use digital technology and low power in order to preserve battery life. With lower power, the risk of interference with adjoining and neighboring services, including television channel 13, will become negligible. Of course, licensees on neighboring frequencies – concerned with their own narrow self-interest – have an incentive to impose whatever burden on the 218-219 MHz service they can to protect themselves from even the most remote possibility of interference. And licensees in other services that fear competition from the new services that may be provided by 218-219

⁶ In a second auction, Bay Area assumes the Commission will take appropriate measures to ensure that only sincere, financially qualified parties bid and that contractual provisions are in place to ensure payment by winning bidders.

MHz licensees have every incentive to impose whatever disabling technical restrictions they can.

However, the real public interest can best be addressed by requiring licensees in the 218-219 MHz service not to interfere with lawful operations in other frequencies, while leaving the mean of compliance to their discretion. Should a 218-219 MHz licensee cause interference, it would be responsible for implementation of the remedy.⁷ Such an approach will provide an incentive for licensees to take all appropriate measures to avoid interference and encourage technical innovation. This approach is also far more consistent with the Commission's deregulatory policies than the current, overly detailed rules.

The approach the Bay Area suggests also has the benefit of eliminating restrictions on operations urged by other licensees whose concern is to avoid competition not to avoid radio interference. It is the Commission's role to promote innovation, not to deter it with inflexible non-productive rules such as the duty-cycle limitation in the 218-219 MHz service. By eliminating all technical requirements and relying on the licensee's obligation not to interfere the Commission will fulfill its responsibility to advance communications technology while providing adequate protection for current applications.

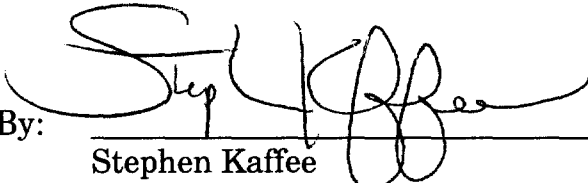
⁷ Similarly, where licensees from other services cause interference to lawful operations in the 218-219 MHz service, they should be responsible for the remedy.

Conclusion

Bay Area believes that the instant rulemaking is a unique opportunity for the Commission to revive a troubled service and to demonstrate the practicability of true deregulation. To take advantage of this opportunity, however, the Commission must re-focus its attention on the real purposes of the agency. The Commission must put aside narrow revenue-generating objectives (as opposed to the proper allocation objectives) of the auctions when they would interfere with providing the public with the best, most advanced and efficient communications services possible.

Respectfully submitted,

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